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No. 89-970

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

FIRST COMICS, INC.,
Petitioner,

vs.

WORLD COLOR PRESS, INC.,
Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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QUESTIONS PRESENTED

Petitioner's statement of "Questions Presented for Review" violates the dictate of Supreme Court Rule 21.1(a) that questions should be expressed in the terms and circumstances of the case. No portion of the Seventh Circuit's opinion can be construed as holding that comic books are not "commodities" for Robinson-Patman Act purposes. To the contrary, the Seventh Circuit explicitly observed that the physical books themselves are commodities, and held that, based upon the facts of this case, the act of printing the books for a publisher entails the provision of a "service" to the publisher by the printer.

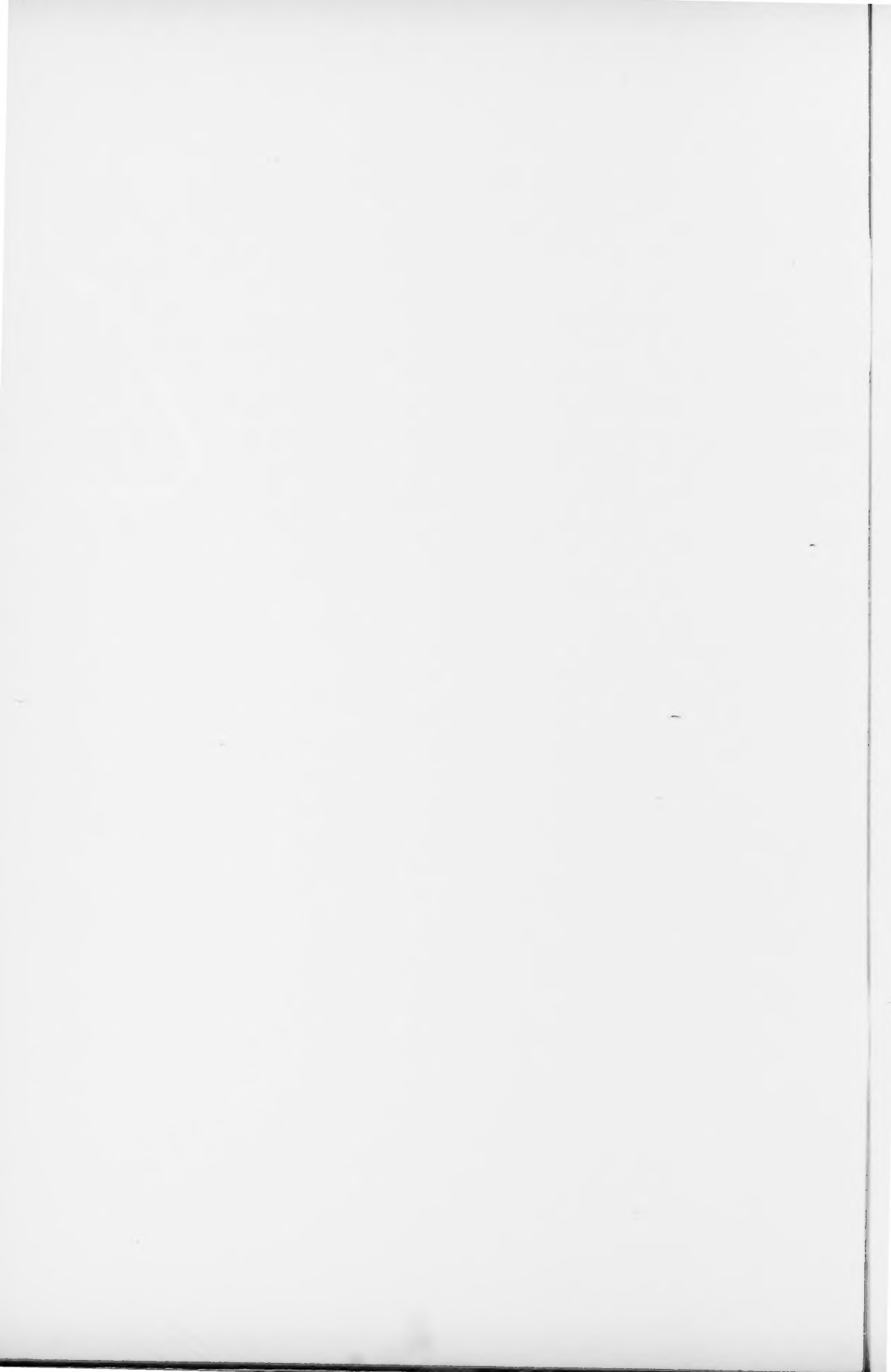


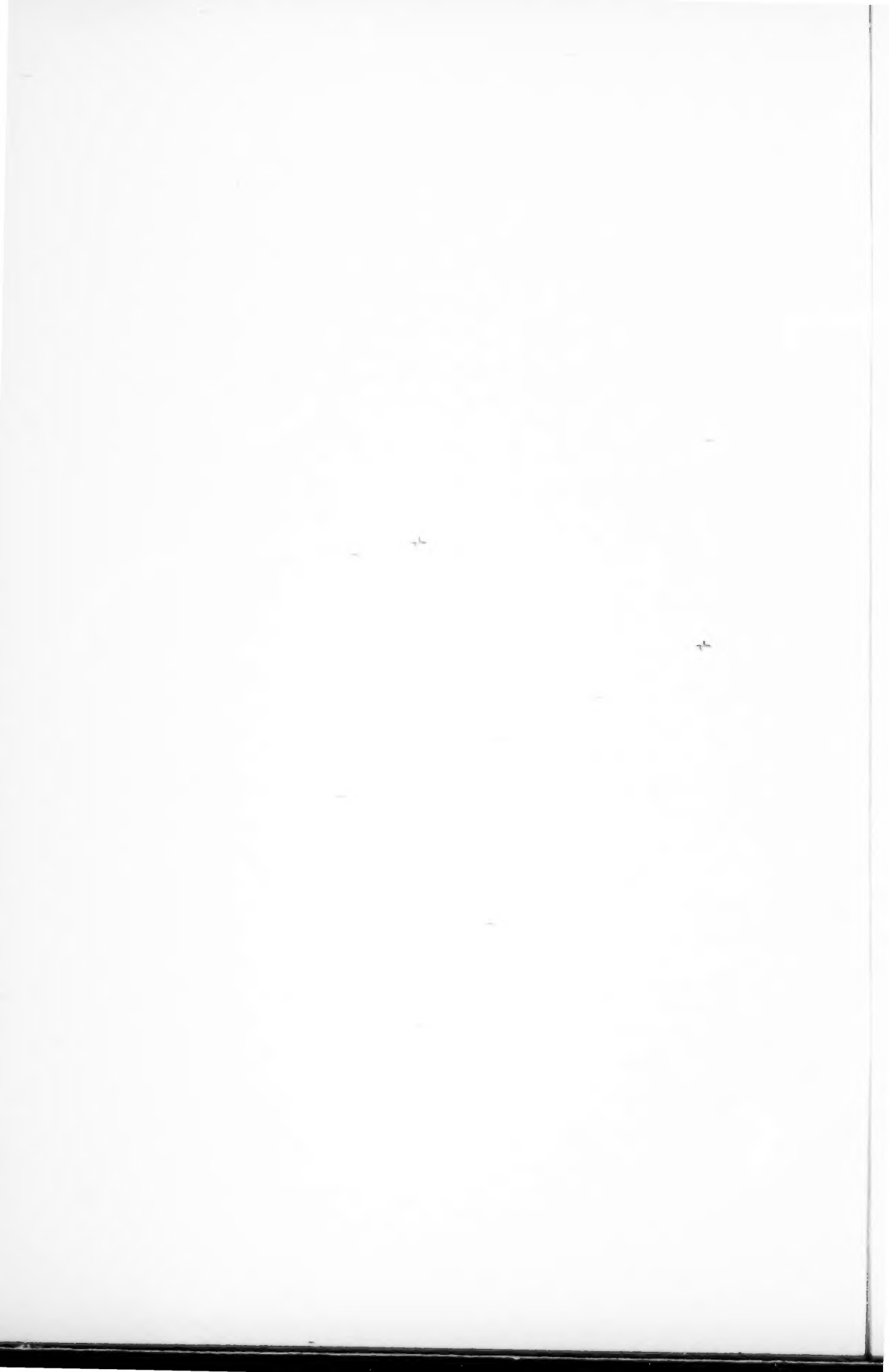
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Respondent World Color Press, Inc. respectfully requests that the Court deny the petition for writ of certiorari seeking review of the decision in this case of the United States Court of Appeals for the Seventh Circuit.

¹ In conformity with Supreme Court Rule 28.1, respondent states that it is a wholly-owned subsidiary of Printing Holdings, L.P., a Delaware limited partnership; that it has no subsidiaries except ones wholly owned by it; and that its affiliate is Commercial Printing Holding Company.

STATEMENT OF THE CASE

Background. In February, 1984, First Comics, Inc. ("FC") filed the instant action against World Color Press, Inc. ("WCP") alleging, in relevant part, violations of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a) (the "Act").

FC is a Chicago-based publisher of comic books. As a publisher, FC and its authors and artists produce the artwork and stories that comprise the comic books which it publishes. Further, as the publisher, FC owns the federal copyright rights to publish, copy, distribute and sell its comic books.

WCP is a printer of comic books, magazines and other periodicals. It is *not* a publisher. As a printer, when dealing with FC and other publishers, WCP provides a service in which it supplies paper and ink and then prints the publisher's artwork and stories, using color separation screens owned and provided by the publisher. WCP does not hold the federal copyright rights of publication and sale of the printed works, which at all times remain in the copyright-owning publishers throughout the printing stage of production.

Comic books, like other books, are distinguished from one another by several features which consumers and publisher customers view as significant. These include differences as to the characters, artwork, story, artist and author for each book, and copyright restrictions that would prevent one publisher from legally selling copyrighted works of another publisher. Because of these differences, comic books printed for one publisher (be it FC, Marvel Comics, DC Comics or anyone else) are not substitutable to fill the print order of another publisher. Rather, each publisher is interested only in those books bearing its own characters, artwork, stories and copyrights. (See FC App. 8-9).

FC's Own Pricing Practices. The Robinson-Patman claim at issue in this case concerned acknowledged differences in the

prices charged by WCP to FC versus WCP's largest volume print customers, in particular, Marvel Comics and DC Comics. FC was charged an average of 11.1 cents per copy, or 4.3 cents more per copy than Marvel and DC. FC did not, however, charge its wholesale customers the same added 4.3 cents. Instead, during the time period relevant to the case, FC charged its wholesale customers over *ten* cents more per copy than did its competitors Marvel and DC. (i.e., more than *twice* the amount of the alleged cost discrimination). Moreover, FC set a retail list price on its comic books of \$1.00, when Marvel, DC and other comic book publishers had list prices of only 60 cents to 75 cents per copy, for a price spread at the consumer level of approximately ten times (40 cents) the amount of the alleged printing cost discrimination (4.3 cents). Despite the pricing behavior on FC's own part, evidence was presented that FC remained profitable and that the market remained competitive. (See FC App. 14-15, 48-49).

Jury Verdict and Appeal. Before sending the case to the jury, the trial judge directed findings that as a matter of law: (1) WCP was engaged in the sale of commodities and not services for Robinson-Patman Act purposes, and (2) the commodities (finished comic books) were of like grade and quality for purposes of the Act, notwithstanding their undisputed differences in story, artwork, author and characters. Despite these directed findings in favor of FC, the jury found for WCP, in light of FC's own pricing behavior and other evidence going to the issues of competitive effect and causation.

FC appealed the jury verdict in WCP's favor to the Seventh Circuit, and WCP cross-appealed the trial court's directed findings on the issues of "commodity" and "like grade and quality." On appeal, the Seventh Circuit reversed the lower court's directed findings and held that, as a matter of law, a printer such as WCP that prints for a publisher such as FC is engaged in the service of printing publications that are not of

like grade and quality for Robinson-Patman purposes.² The jury verdict in WCP's favor was, thus, left intact on the jurisdictional ground that FC's Robinson-Patman claim should not have been sent to the jury in the first place.

² The decision of the Seventh Circuit appears at 884 F.2d 1033.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT BOTH WITH ESTABLISHED CASELAW GOVERNING THE DISTINCTION BETWEEN A "COMMODITY" AND A "SERVICE" AND IS WITH OTHER CIRCUIT CASES

FC greatly distorts the actual holding of the Seventh Circuit in this case when it argues that the Circuit Court held, as a matter of law, that physical comic books are "not commodities" (FC Brief i, 11-13). This incorrect characterization of the Circuit Court's ruling is the foundation of FC's argument as to why the writ should be granted on the commodity-versus-service issue. Because the foundation is faulty, the petition for the writ should be denied.

In fact, the Seventh Circuit did *not* hold that the physical comic books produced by WCP are not commodities. The Circuit Court specifically observed that "[t]he parties do not dispute that comic books are commodities within the meaning of the Act" (FC App. 5). What the court *did* hold was that the "dominant nature of the transaction" between WCP and its publisher customers was one for printing services consisting of "transpos[ing] images from one surface to another" (FC App. 7). As observed by the court:

"[W]hat was First Comics buying? It was not buying the comics themselves — First Comics' artists and authors produce the comics. And it was not merely buying the paper and ink. The tangible items provided by World Color Press, the paper, ink and staples, are uniformly fungible and not subject to significant price differentials among printers. Rather, as First Comics argues in its brief, World Color Press is 'the only [printer] using the less costly 'letterpress' method' (Br. 3) — and that is what First Comics

was purchasing, the letterpress method and process of transposing and multiplying images. As explained in Rowe, *supra*, at 60-61, price quotations fusing physical elements with dominant intangible factors do not begot price discrimination within the Act.

The singularly most important ingredient, the color separations, were provided by First Comics. Defendant was in essence multiplying what First Comics already produced. Borrowing from *Advanced Office Systems v. Accounting Systems Co.*, 442 F.Supp. 418, 423 (D.S.C. 1977) (preparation of billing statements is a service), at the printing stage the comic books lack real value to any entity other than First Comics. World Color Press cannot sell the finished comic books to any other buyer since First Comics holds the copyright, nor would any of World Color Press' other clients be interested in finished comic books bearing a First Comics story — rather each client wants only the printed version of its own comic book.” (FC App. 8).

The decision of the Seventh Circuit is perfectly consistent with those of other Circuit Courts. When confronted with the issue of whether a hybrid transaction involving a mix of services and physical materials should be treated as a “commodity” or a “service” sale for Robinson-Patman purposes, other courts have applied the same test utilized by the Seventh Circuit; they have inquired as to the “dominant nature of the transaction” in light of the facts and circumstances relevant to the particular case. (See, e.g., the cases cited at page 8, *infra*.)

The book and other publication cases cited by FC are not to the contrary. Each of them involved sales of books, newspapers or other printed publications *by a publisher* engaged in the sale of *identical* already-printed publications to different wholesale or retail customers. *Reid v. Harper & Bros.*, 235 F.2d 420 (2nd Cir.), *cert. denied*, 352 U.S. 952 (1956) (suit by book wholesaler

against its publisher supplier); *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383, (8th Cir.), *cert. denied*, 419 U.S. 836 (1974) (suit by a competitor against a newspaper publisher); *In the Matter of Archie Comic Publications*, 61 F.T.C. 100 (1962) (non-litigated consent order involving sales to wholesale and retail customers by a publisher of comic books); *In the Matter of National Comics Publications, Inc.*, 57 F.T.C. 69 (1959) (non-litigated consent order involving sales to retail customers by a publisher of comic books); *In the Matter of Christmas Club*, 25 F.T.C. 1116, 1125 (1937) (FTC action against a publisher of account books, passbooks and advertising literature sold by it to banks and bank depositors);³ *In the Matter of American News Co.*, 58 F.T.C. 10 (1961) (FTC action against a distributor for inducing price discriminations by publishers in the sale of books, magazines and comic books). As observed by the Seventh Circuit:

“[The Court’s ruling] does not conflict with earlier decisions holding that newspapers and books are commodities, because in those cases the defendants were the publishers. There the publishers were sued for discriminatory pricing schemes for identical books and identical newspapers sold to different retailers and consumers. The publishers were indeed selling commodities, the predominant nature of the transactions was between the publishers and their customers and involved sales of identical products. Here the transaction was for printing, a service which made possible the production of commodities for future sales by plaintiff. The Robinson-Patman Act was therefore inapplicable.” (FC App. 9).

³ In its Brief, FC erroneously characterized this case as not involving a publisher. FC Brief 12-13. Actually, the respondent in *Christmas Club*, like FC, was a publisher that owned all copyright rights in the subject works and had them printed by other firms (like WCP) to its specifications for sale by it to banks and consumers. 25 F.T.C. at 1125.

Equally misplaced is FC's unsupported assertion that services outside the Robinson-Patman Act "do not end with a tangible, self-contained object" (FC Brief 14). The fact that a service happens to contribute to the creation of a tangible object does not *ipso facto* mean that the business providing the service is engaged in the sale of the finished object. Rather, the determination must be made based upon an analysis of the facts of each case to ascertain the "dominant nature of the transaction." See, e.g., *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186, 1191 (5th Cir. 1978) (applying the dominant nature test to hold that a company that repaired airplane engines was a service provider, even though its service included parts as well as labor and resulted in a finished tangible object); *General Shale Products Corp. v. Struck Construction Co.*, 132 F.2d 425, 428 (6th Cir. 1942) (applying the dominant nature test to hold that a company that constructed buildings was a service provider, even though its service included bricks and other materials as well as labor and resulted in finished buildings); *SCM Corp. v. Xerox Corp.*, 394 F.Supp. 384 (D. Conn. 1975) (applying the dominant nature test to hold that a xerography copying business was a service, even though it resulted in finished photocopies of printed publications).

In affirming the jury verdict for WCP, the Seventh Circuit applied precisely the same standard, i.e., what is the "dominant nature of the transaction." Moreover, it did so in a way that achieved a realistic and workable distinction between the case actually before it (involving a mere "printer" of books that brings to the transaction paper, ink and its printing service) and the "publisher" cases on which FC relies (in which the defen-

dant is a publisher that sells already-printed books created by it and over which it holds all federal rights of copyright).⁴

II.

THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT BOTH WITH ESTABLISHED CASELAW GOVERNING DETERMINATION OF WHETHER ITEMS ARE "OF LIKE GRADE AND QUALITY" FOR ROBINSON-PATMAN ACT PURPOSES AND WITH OTHER CIRCUIT CASES

Having argued that WCP is a seller of finished comic books, FC engages in intellectual back pedalling when it comes to the issue of "like grade and quality." Here, FC argues that WCP is *not* a seller of finished comic books. Rather, WCP is somehow a seller of finished publications for which no consideration whatever is to be given to story, artwork, author, artist or publisher. (FC Brief 21-24). So stripped, WCP becomes a seller of blank pieces of paper bound and stapled together.

As observed by the Seventh Circuit, this is most certainly not what WCP's publisher customers expected to get. Rather, each customer expected "the printed version of its own comic book," (FC App. 8) i.e., a fully printed comic book that the publisher could then sell to its readers.

⁴ FC's arguments (FC Brief 18-21) that the copyrighted nature of the works in question should somehow simply be disregarded is absurd on its face. The fact that WCP, as a printer, does not have the legal right under federal copyright law to "sell" a finished comic book to any publisher except the one who ordered it is a powerful factor bearing upon the true nature of the transaction. Copyright restrictions are similarly an important factor affecting publisher-customer perceptions as to the substitutability of a book printed for one publisher to meet the needs of a different publisher, i.e., the degree of "like grade and quality" between the books. The Seventh Circuit properly considered copyright restrictions in its analysis, just as it considered other relevant factors bearing upon the dominant nature of the transaction and customer perceptions of what was actually being purchased (FC App. 8-9).

The cases relied upon by FC are not to the contrary (FC Brief 22-23). In each of them, the defendant was either selling physically identical goods or goods so closely identical as to constitute “like grade and quality” substitutes where customers were free to make such a substitution if they wished. *Joseph A. Kaplan & Sons, Inc.*, 63 F.T.C. 1308, 1347-48 (1963), *mod. on other grounds*, 347 F.2d 785 (D.C. Cir. 1963) (minor pattern differences as to otherwise identical shower curtains, where customers were free to substitute one curtain for another); *Advanced Office Systems v. Accounting Systems Co.*, 442 F.Supp. 418, 423 (D.S.C. 1977) (dictum that T-shirts with different patterns might still be of like grade and quality, where freely substitutable by the defendant’s customers); *FTC v. Borden Co.*, 383 U.S. 637 (1966) (identical milk products); *Bruce’s Juices, Inc. v. American Can Co.*, 87 F.Supp. 985 (S.D. Fla. 1949), *aff’d*, 187 F.2d 919 (5th Cir.), *cert. denied*, 342 U.S. 875 (1951) (identical cans); *In the Matter of General Foods Corp.*, 52 F.T.C. 798, 817 (1956) (slight variations in blends and roastings of coffee products); *In the Matter of Doubleday & Co., Inc.*, 52 F.T.C. 169, 192-93 (1955) (in relevant part, not a Robinson-Patman Act case, but a resale price fixing case).

The instant case could hardly be more different. A FC comic book is not distinguished from a Marvel or a DC comic book by minor “pattern” differences where WCP’s publisher customers are free to substitute one book for another. Undisputed distinctions as to characters, story content, artwork, artist, author, and copyright rights of distribution and sale mean that the finished comic books printed for one publisher “are of no use to any other publisher” (FC App. 9).

Also misplaced is FC’s argument that the Seventh Circuit erroneously applied an “ultimate consumer” test, rather than measuring like grade and quality in terms of WCP’s own customers: namely, WCP’s publisher customers such as FC and Marvel (FC Brief 23-24). The Circuit Court *did* look to the needs and perceptions of WCP’s publisher customers, and con-

cluded that “[s]ince the finished First Comics comic books are of no use to any other publisher,” books printed for FC were not of “like grade and quality” with books printed for other publisher customers. (FC App. 8-9, n.6).

The Seventh Circuit’s decision, thus, did exactly what other cases have done when faced with the issue of product like grade and quality; it focused upon the physical similarities or dissimilarities of the goods being compared and asked how the dissimilarities, if any, affected customer purchasing behavior. This is not, in the words of FC, a “sweeping, wholesale excision from the Robinson-Patman Act”; it is a straight-forward application of established Robinson-Patman caselaw.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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